Entered August 19, 2008

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1297

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICKEY CLARK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 02 CR 1129-**Joan B. Gottschall**, *Judge.*

ARGUED APRIL 15, 2008-
DECIDED AUGUST 19, 2008

Before CUDAHY, KANNE, and SYKES, *Circuit Judges.*

KANNE, *Circuit Judge.* Rickey Clark entered a blind guilty plea with respect to one count of conspiring to possess cocaine with intent to distribute, *see 21 U.S.C. § 846*, and one count of possessing cocaine with intent to distribute, *see id. § 841(a)(1)*. The district court determined by a

preponderance of the evidence that Clark had possessed between 15 and 50 kilograms of cocaine. At the sentencing hearing, the government's attorney repeatedly stated, in error, that Clark was not subject to a mandatory minimum sentence. The judge considered the *18 U.S.C. § 3553(a)* sentencing factors and imposed a sentence of 48 months' imprisonment. The very next day, the government filed a motion to correct the sentence, *see Fed. R. Crim. P. 35(a)*, based on the fact that the court was required to impose a mandatory minimum sentence of ten years due to the quantity of cocaine Clark possessed, *see 21 U.S.C. § 841(b)(1)(A)(ii)*. The court agreed that the mandatory minimum applied, and it amended the judgment to correct the sentence. Because the district court acted within its power under *Federal Rule of Criminal Procedure 35(a)* when it corrected Clark's sentence to reflect the statutory mandatory minimum, we affirm Clark's sentence.

I. HISTORY

Rickey Clark was charged in a multi-count indictment for his participation in a cocaine-distribution conspiracy. Without a written plea agreement from the government, Clark pled guilty to two of the charged counts: conspiring to possess cocaine with intent to distribute, *id. § 846*, and possessing cocaine with intent to distribute, *id. § 841(a)(1)*. Clark did not admit that his offenses involved a particular quantity of cocaine, and he maintained throughout the proceedings that he possessed less than one kilogram. He also argued that the quantity of drugs at issue is an element of

his *21 U.S.C. § 841* offense, and that the *Fifth* and *Sixth Amendments* precluded subjecting him to an enhanced sentence based on a drug quantity that was not determined by a jury beyond a reasonable doubt. At the drug-quantity hearing, the district court pointed out that the Seventh Circuit has rejected similar constitutional arguments, and proceeded to decide the drug quantity by a preponderance-of-the-evidence standard.

The government called Juan Corral as a witness at the drug-quantity hearing. Corral was a cocaine dealer who had spent time in prison for drug-trafficking convictions. Clark was one of Corral's repeat, multiple-kilogram customers between the months of February and June, 2002. During that time period, Corral's sales of cocaine to Clark varied in quantity and frequency. Corral experienced some "droughts," during which Corral's suppliers could not provide him with cocaine. But, Corral explained, Clark was one of his "preferred" customers--whenever Corral came off of a drought, Clark was one of the first customers he would call.

Corral shared how he and Clark would arrange their meetings. They would talk over the phone and arrange a meeting place. They used code words to refer to kilograms of cocaine, including the terms "bench press," "reps," and "tickets." Corral recounted one particular conversation he had with Clark, on June 5, 2002, in which the two men referred to the kilograms of cocaine as "tickets." He said that Clark had asked for five tickets (kilograms), but that he was trying to get Clark to take six. Corral said he

had no doubt in his recollection that on June 5, he and Clark talked about kilograms of cocaine.

In recalling his encounters with Clark, Corral stated that the smallest amount of cocaine he sold Clark on one occasion was three kilograms; the largest amount was around eight kilograms. The amount of cocaine that Clark most frequently purchased from Corral was five to six kilograms. Corral stated that he was "100 percent sure" that when Clark bought cocaine from him, he bought three or more kilograms at a time. Corral recalled, "to the best of [his] knowledge," that he dealt with Clark about once a month. Based on those recollections, Corral estimated that he sold Clark "maybe 17 kilos" of cocaine during the five-month period. Corral thought that he dealt with Clark one time in February, and maybe twice in March. But he could not give estimates for April, May, or June. Corral did not remember the specific dates on which he sold cocaine to Clark. Corral explained how he arrived at the 17-kilogram estimate, which he felt was conservative: "I dealt with him from February 2002 to June 2002. And I [estimated] three keys a month, that would come out to 15. And I know for sure that he purchased at times more than three keys."

When considering the testimony, the district court explained that standing alone, Corral's memory of the sales to Clark was not "good enough to send somebody away for." The court then asked the government how many conversations between Corral and Clark they had recorded--"how many discussions about transactions is the Government

actually able to prove with telephone calls?" The government then referred to the complaint affidavit, which detailed some of the wiretapped conversations. During one such conversation, on May 14, Corral and Clark discussed five kilograms of cocaine. Another set of wiretapped conversations dealt with the June 5 transaction to which Corral testified and addressed five to six kilograms of cocaine. The district court determined that these two phone conversations corroborated Corral's testimony that his drug deals with Clark happened once a month.

The government, however, did not introduce into evidence the actual transcripts or tapes of the wiretapped phone calls. The court instead relied on summaries of the wiretapped conversations contained in a complaint affidavit that was attested to by a drug-trafficking agent in the government's efforts to show probable cause before a magistrate judge. Clark objected to the district court's reliance on the complaint and its affidavit, because "defendants are not included in terms of drafting the complaint, can't cross-examine the drafter of it, can't make any changes, can't make any suggestions. It's the Government's document which they submit."

The district court stated that the summarized wiretapped conversations were "irrefutable evidence that [Clark] was discussing relatively large deals, that's deals in the five-to-six kilogram range with Mr. Corral on two occasions." Those conversations proved to the judge that Corral was "telling the truth in terms of the kind of customer that Mr. Clark was." Even though the tapes were not in evidence, the

district court "assum[ed] the Government ha[d] this evidence that it [was] describing in the complaint." The court explained that the government's summary of the taped conversations was, to some extent, corroborated by Corral. Additionally, the court explained, "This is an official court document. So I'm assuming, for purposes of this drug quantity hearing, where the standard is a preponderance of the evidence, and I don't think rules of evidence strictly apply, that I can rely on the Government's assertion that this complaint is based on surveillance."

Clark also argued that the court should discredit Corral's testimony because Corral was an admitted perjurer who had a deal with the government that was contingent on him testifying to certain things. The district court did not agree, and found that Corral was "trying to be truthful and [ ] trying to be conservative," even though his precision was less than satisfactory. Thus, while Corral's testimony alone was not precise enough, in the district court's view, to justify a 15-kilogram drug-quantity finding, the combination of Corral's testimony with the summarized wiretaps convinced the court that Clark's offense involved more than 15 kilograms of cocaine.

Shortly after the drug-quantity hearing, Clark appeared for sentencing on January 17, 2007. The district court began the sentencing hearing with a question about mandatory minimums: "Is there a mandatory minimum that applies in this case?" The Assistant United States Attorney (AUSA) replied, "There is not, Judge, and the presentence

investigation report is incorrect in regard to that." The AUSA explained that without the mandatory minimum, Clark's sentencing range was 108 to 135 months' imprisonment; his Criminal History Category was I and his offense level was 31. The court repeated its question: "Okay. With no mandatory minimum?" The AUSA replied, "Right."

Clark argued for a sentence below the guidelines range because of his personal characteristics, his steady employment background, and the fact that he had no prior criminal convictions. Clark also argued that he deserved a sentence below the guidelines range because of the weak evidence demonstrating drug quantity. In response, the government urged the district court to sentence Clark within the guidelines range: "the Government would just argue that a guideline range is appropriate here, particularly given that the mandatory minimum does not apply ..."

The district court viewed Clark's cocaine-selling activities as a "significant mistake," but stated that the "rest of his life has been pretty good." The court cited Clark's minor criminal history, his "huge job stability," and the fact that he is a family man, as factors indicating that he is a person who "appears to have a good life and a positive life." The court also took into consideration negative factors--such as Clark's gambling problems and his new conviction for a serious felony drug offense--when analyzing the sentencing factors under *18 U.S.C. § 3553*. The judge decided on a sentence of 48 months, to reflect the "seriousness of the offense," while giving Clark "an

opportunity to resume the positive aspects of his past life when he is released."

The very next day, the government submitted a motion to correct Clark's sentence, pursuant to *Federal Rule of Criminal Procedure 35(a)*. The government acknowledged the mistake it made at sentencing in insisting that no mandatory minimum applied to Clark's offense. The government argued that the district court was required to impose the mandatory minimum prescribed by *21 U.S.C. § 841(b)(1)(A)(ii)*, because of the 15 kilograms attributed to Clark's offense by the court. The district court agreed that the court's drug-quantity finding subjected Clark to the statutory mandatory minimum. The district court explained that, while "the court was able to determine the drug quantity based on a preponderance of the evidence, [the court] does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt." The court exercised jurisdiction under *Rule 35(a)* and resentenced Clark to ten years in prison.

II. ANALYSIS

On appeal, Clark argues that the district court was not authorized under *Rule 35(a)* to change his sentence. He also argues that his *Fifth* and *Sixth Amendment* rights were violated when the district court found, by a preponderance of the evidence, facts that subjected him to a mandatory minimum sentence of ten years. Finally, he argues that the district court's calculation of the quantity of drugs involved in his offense was clearly erroneous.

A. The district court's correction of Clark's sentence

Clark argues that the district court was not authorized to correct his sentence under *Rule 35(a)* to reflect the statutory mandatory minimum because, in Clark's opinion, the Rule does not allow a correction in a case where the government waived the application of the mandatory minimum at the sentencing hearing. This presents a question of law that we review *de novo*. *See United States v. Mendoza, 510 F.3d 749, 754 (7th Cir. 2007)* (Whether the district court followed the proper procedures after *United States v. Booker* in imposing [a] sentence is a question of law we review *de novo*." (internal citation omitted)).

Rule 35(a) allows for "Correcting Clear Error": "Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." *Fed. R. Crim. P. 35(a)*. The district court's action in this case--correcting the sentence the day after it was imposed--falls within the parameters of *Rule 35(a)*. The error was not arithmetical or technical, but instead was substantive--the court mistakenly failed to apply the mandatory minimum sentence for Clark's conviction, as prescribed by Congress. *See 21 U.S.C. § 841(b)(1)(A)(ii)*.

The scope of *Rule 35(a)* is narrow; the advisory committee notes indicate that the Rule should "extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court . . . ." *Fed. R.*

Crim. P. 35 advisory committee's note to 1991 Amendments. The Rule does not give the district court a second chance to exercise its "discretion with regard to the application of the sentencing guidelines," nor does it allow for changes to a sentence based on the court's change of mind. *Id.* Additionally, the Rule should not be used in a way that relaxes "any requirement that the parties state all objections to a sentence at or before the sentencing hearing." *Id.*

Clark clings to this last limitation on *Rule 35(a)*, and claims that the government lost its opportunity to argue for application of the mandatory minimum sentence by not raising the issue at sentencing, and more significantly, by affirmatively stating that no mandatory minimum sentence applied to Clark's conviction. With this argument, Clark suggests that whenever the government (or the defendant, for that matter) makes a mistake at a sentencing hearing, the court is bound by that mistake and may not correct a sentencing error that stems from it. Clark's position might make sense if applied to discretionary considerations and enhancements or reductions under the advisory guidelines--parties must state all of their objections to the multiple facets of a sentence at the sentencing hearing. *See United States v. Porretta, 116 F.3d 296, 300 (7th Cir. 1997).* Arguing after-the-fact, via a *Rule 35(a)* motion to correct a sentencing error, that the district court improperly applied a sentencing enhancement or reduction "flies in the face of the advisory committee's admonition that it 'did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing.'" *Id.*

(quoting *Fed. R. Crim. P. 35* advisory committee's note to 1991 Amendments).

But the situation here is different because the mistake was more fundamental-the resulting sentence violated a legislative mandate requiring that persons convicted of Clark's particular crime, with the amount of drugs involved, be imprisoned for a minimum term of ten years. *See 21 U.S.C. § 841(b)(1)(A)(ii)*. The district court repeatedly asked the AUSA whether there was a mandatory minimum it should factor into Clark's sentence, but the AUSA erroneously stated that there was not. To bind the court to the government's error would not only result in a windfall to this particular defendant--who is not unlike other defendants who were correctly sentenced to the mandatory minimum of ten years' imprisonment--but would also directly contravene congressional intent. Unlike the sentencing guidelines, which are advisory, *see United States v. Booker, 543 U.S. 220, 264-65, (2005)*, statutory mandatory minimums are just as they sound--mandatory, *see United States v. Cannon, 429 F.3d 1158, 1160 (7th Cir. 2005)*. To allow a party's blunder at sentencing to defuse the mandate of Congress--especially where the Federal Rules of Criminal Procedure provide a means for district courts to correct such blunders within seven days of the sentence--would convert individual lawyers into legislators each time a court mistakenly follows an illegitimate recommendation. The statements of the Supreme Court in *Bozza v. United States*, are equally pertinent here: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the

prisoner. . . . The sentence as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense." *330 U.S. 160, 166-167 (1947)* (internal citations omitted).

The mistake in this case that Clark desired to let lie would have been reversed on appeal--district courts must abide by statutory sentencing ranges. *See United States v. Roberson, 474 F.3d 432, 434 (7th Cir. 2007)* ("The Supreme Court's decision in *United States v. Booker*, which made the sentencing guidelines advisory, did not authorize district judges to ignore statutory sentencing ranges. . . . *Booker* confers no authority on judges to disregard statutes." (internal citation omitted)). And the district court was well aware of its authority and the repercussions of such a mistake: "based on Seventh Circuit precedent, I have no choice but to impose the ten-year mandatory minimum, and I think the failure to do so and the propriety of doing so is so clear that it would almost certainly result in a remand, which, I take it, is what I need to find in order to have jurisdiction under *Rule 35* to correct the sentence."

Clark continues, however, that the AUSA's denouncement during the sentencing hearing of a mandatory minimum foreclosed the possibility of a sentence correction under *Rule 35(a)* by way of the waiver doctrine. His argument is somewhat tenable in light of our language in *United States v. Byerley, 46 F.3d 694, 699 (7th Cir. 1995)*. In *Byerley*, the government attorney told the district court that it was within the court's discretion to impose a

mandatory sentence. *Id. at 696*. The government was wrong, but the government did not bring the error to the court's attention until over two years later, after the defendant had (unsuccessfully) appealed his sentence, and after we issued our mandate affirming his conviction. *Id. at 697*. The government filed a motion under the old version of *Rule 35(a)*, which allowed the district court to "correct an illegal sentence at any time and [ ] correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence," that is, within 120 days of an affirmance of the judgment. *Id.* (quoting old *Rule 35(a)*). The government acted within the proper time frame under the old rule, but we decided that the district court could not correct the illegal sentence, notwithstanding the language of old *Rule 35(a)*, because of the government's waiver. *Id. at 699-700.*

> An attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course. [The] AUSA [ ] bound his principal and client, the United States, to the position that the application of the Guidelines and a mandatory minimum sentence to Byerley's conviction was discretionary with the district court. The government cannot now use old *Rule 35(a)* to overcome the errors of its agent.

Id. at 700 (internal citation and quotation marks omitted).

Old *Rule 35(a)* was more expansive than the current version of the rule--allowing for the correction of an illegal sentence "at any time" up to 120 days after an affirmance or dismissal of the appeal. *Id. at 697.* Thus, the Rule allowed for corrections of sentences long after their imposition, and in *Byerley,* the implications of such a broad grant of corrective power were clear. The Rule contemplated allowing a party, the government, to sit back throughout the direct appeal process with the possibility of a *Rule 35(a)* correction in reserve. It made sense for us, in terms of judicial economy and the finality expectations of convicted defendants, to impose a limitation on old *Rule 35(a)* in a case where the government reversed the position it advocated to the district court, years after sentencing.

But that functional limitation is no longer necessary because *Rule 35(a)*'s revision includes a limitation that protects the dual concerns of judicial economy and finality: the district court must correct the sentence within seven days, *see Fed. R. Crim. P. 35(a),* and it may not correct the sentence after that time period, *see United States v. Baldwin, 414 F.3d 791, 797 (7th Cir. 2005)* ("The Supreme Court has held that these rules [including *Rule 35(a)*] operate to deprive the court of authority to act after the time period specified in the rule has elapsed." (citing *Carlisle v. United States, 517 U.S. 416, 428 (1996)) (overruled in part on other grounds by United States v. Parker, 508 F.3d 434, 441 (7th Cir. 2007)).* Unfortunately for Clark, the doctrine of waiver is no longer necessary, nor applicable to the new Rule. Where a party makes a mistake at a sentencing hearing, which in turn leads to the imposition of a

sentence that is clearly wrong--for example, a mistake in contravention of clear congressional intent or mandate--the district court may correct the sentence so long as the correction complies with *Rule 35(a)* and occurs within seven days. We emphasize that such mistakes might be made by either party--if a defendant did not realize at sentencing that he was *not* subject to a mandatory minimum sentence, but the court erroneously applied one, the defendant could make a motion for a corrected sentence within the seven-day time period. We also reiterate that the scope of *Rule 35(a)* is narrow, and our reasoning should not be read to allow parties to raise, after sentencing, arguments for or against enhancements or reductions under the guidelines that should have been raised at the sentencing hearing. *See Porretta, 116 F.3d at 300.* To the extent that this decision is inconsistent with our prior ruling in *Byerley,* we overrule that portion of *Byerley. 46 F.3d at 700.*[1]

B. The imposition of a mandatory minimum sentence based on judge-found facts

Clark contends that the quantity of drugs involved in his offenses should have been determined beyond a reasonable doubt, by a jury. We review this *Apprendi* issue *de novo. United States v. Seymour, 519 F.3d 700, 709 (7th Cir. 2008); see also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).* Clark was

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[1] This opinion has been circulated among all judges of this court in regular active service pursuant to *Circuit Rule 40(e).* No judge favored a rehearing en banc. Judge Flaum did not participate in the consideration of this case.

convicted under *21 U.S.C. § 841*, which prescribes in its subsections escalating penalties for defendants depending on the quantity of a controlled substance the defendant knowingly or intentionally manufactured, distributed, dispensed, or possessed with intent to manufacture, distribute, or dispense. *21 U.S.C. § 841(a)(1), (b)*; *see also United States v. Hernandez, 330 F.3d 964, 979-80 (7th Cir. 2003)*. Because the amount of cocaine involved in Clark's conviction was over five kilograms, he was subject to a mandatory ten-year term of imprisonment. *21 U.S.C. § 841(b)(1)(A)(ii)*. This mandatory term was below the twenty-year maximum term Clark could have received for a *§ 841* conviction absent any drug-quantity determination. *See id. § 841(b)(1)(C)*.

Clark acknowledges that we have held on multiple occasions that judges may find facts, by a preponderance of the evidence, that subject a defendant to a statutory mandatory minimum. *See United States v. Price, 516 F.3d 597, 605 (7th Cir. 2008)*; *United States v. Jones, 418 F.3d 726, 732 (7th Cir. 2005)*; *United States v. Knight, 342 F.3d 697, 714 (7th Cir. 2003)*; *Hernandez, 330 F.3d at 980-82*; *see also United States v. Collins, 510 F.3d 697, 701 (7th Cir. 2007)*. We see no reason to depart from our precedent and continue to hold that "*Apprendi* has no application where a drug dealer is given a sentence at or below the maximum provided in *§ 841(b)(1)(C)*." *Hernandez, 330 F.3d at 980*; *see also United States v. Abdulahi, 523 F.3d 757, 760 (7th Cir. 2008)* ("*Apprendi* has no application to cases like this one where the sentence is below the statutory maximum.").

One of Clark's arguments on this topic warrants brief consideration. Clark encourages us to rethink our precedent because the Second and Ninth Circuits have adopted contrary approaches to drug-quantity determinations under *§ 841*. In *United States v. Gonzalez, 420 F.3d 111, 133-34 (2nd Cir. 2005)*, the Second Circuit concluded that the "drug quantities specified in *21 U.S.C. § 841* are elements that must be pleaded and proved to a jury or admitted by a defendant to support any conviction on an aggravated drug offense, not simply those resulting in sentences that exceed the maximum otherwise applicable for an identical unquantified drug crime." And in *United States v. Velasco-Heredia, 319 F.3d 1080, 1085-87 (9th Cir. 2003)*, the Ninth Circuit decided that facts subjecting defendants to mandatory minimums under *§ 841* must be proven to a fact-finder beyond a reasonable doubt.

"While we carefully and respectfully consider the opinions of our sister circuits, we are not bound by them." *United States v. Williams, 184 F.3d 666, 671 (7th Cir. 1999)*. "Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits." *Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 443 (7th Cir. 1994)*. We have carefully analyzed whether drug quantity constitutes an element of an *§ 841* offense that must be proven to a jury beyond a reasonable doubt, and have decided time after time that neither the statute, nor *Apprendi* and its progeny, dictates such a result. *See, e.g., United States v. Martinez, 301 F.3d 860, 863-66*

(7th Cir. 2002); see also Abdulahi, 523 F.3d at 760-61; Hernandez, 330 F.3d at 980-81.

C. The district court's drug-quantity findings

We review the district court's determination of drug quantity for clear error. *United States v. Artley, 489 F.3d 813, 821 (7th Cir. 2007).* "This is a highly deferential standard of review and we refuse to 'second-guess the sentencing judge.'" *United States v. Hankton, 432 F.3d 779, 789 (7th Cir. 2005)* (quoting *United States v. Cleggett, 179 F.3d 1051, 1054 (7th Cir. 1999)).* The government had the burden of proving drug quantity to the court by a preponderance of the evidence, *United States v. McGowan, 478 F.3d 800, 802 (7th Cir. 2007); United States v. White, 360 F.3d 718, 720 (7th Cir. 2004),* but the evidence supporting the drug-quantity determination need not have been limited to evidence admissible at trial. *White, 360 F.3d at 720; United States v. Galbraith, 200 F.3d 1006, 1011-12 (7th Cir. 2000).*

Clark argues that the district court should not have relied on the testimony of Juan Corral because Corral was an admitted perjurer and drug user who had lied previously to protect his own interests. This argument fails because the district court specifically found Corral to be a truthful witness, despite his inability to remember specific details about his deals with Clark. A district court's determination of witness credibility is "entitled to great deference and 'can virtually never be clear error.'" *White, 360 F.3d 718, 720 (7th Cir. 2004)* (quoting *United States v. Blalock, 321 F.3d 686, 690 (7th Cir. 2003)).* Further,

a sentencing court may credit testimony that is "'totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.'" *Id.* (quoting *Blalock, 321 F.3d at 690*); *see also Galbraith, 200 F.3d at 1012*; *United States v. Rodgers, 245 F.3d 961, 968 (7th Cir. 2001)* ("[T]he district judge was free to credit Dexter. That Dexter was a convicted felon who stood to gain from his testimony against Rodgers is by no means a remarkable circumstance."). Furthermore, it is clear from the record that Corral's testimony about his sales to Clark never wavered. He maintained throughout the 17-kilogram estimate, and consistently explained that Clark usually purchased five kilograms, sometimes purchased three, and at least once purchased eight. Unlike the situation in *United States v. Beler, 20 F.3d 1428, 1433-34 (7th Cir. 1994)*, where the witness wavered in his testimony about drug quantity, Corral's testimony remained constant.

To compute his estimate of cocaine sales, Corral multiplied the minimum number of kilograms he sold to Clark during a transaction (three kilograms) by the number of months he dealt with Clark (five months)--15 kilograms. Because he remembered selling Clark more than three kilograms "at times," he added an additional two kilograms to his total calculation of 17 kilograms, which Corral stated was conservative. This method of computation, assuming credibility and reliability of the witness, is permissible. A district court may "calculate drug quantity by taking a witness's estimate of the amount of drugs she usually purchased and multiplying it by the number of times she bought

drugs from the defendant." *White, 360 F.3d at 720*; *see also United States v. Durham, 211 F.3d 437, 444 (7th Cir. 2000)*.

Granted, Corral could not recall the specific details of his deals with Clark, the exact number of occasions he sold cocaine to Clark, or the amount of cocaine involved in each sale. Clark argues that because Corral could not remember details, his testimony lacked the required "indicia of reliability" that would allow the district court to rely on his statements. *See Beler, 20 F.3d at 1433*. Indeed, the district court agreed that Corral's recollections were vague and not specific enough in themselves to support a drug-quantity finding of over 15 kilograms. However, the district court decided that the summaries of the wiretapped phone conversations--contained in the original complaint affidavit that was submitted to a magistrate judge--corroborated Corral's testimony. The two phone calls from May and June corroborated Corral's testimony that Corral dealt with Clark about once per month and that Corral sold Clark kilogram quantities of cocaine.

The transcripts of those conversations were not admitted into evidence, nor were the actual recordings--so Clark objects to the district court's reliance on the complaint affidavit that summarized the conversations. The district court explained that because the standard was only a preponderance of the evidence, and the rules of evidence did not apply, it could rely on the government's assertion in an official court document that the "complaint [was] based on surveillance."

Section 6A1.3(a) of the Guidelines allows sentencing courts to "consider information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The complaint affidavit was a document presented to a magistrate judge and attested to by the drug trafficking agent. The district court was entitled to credit the complaint as an accurate summary of the government's evidence about Clark. There was nothing suggesting that the complaint was unreliable or that it contained inconsistencies, which was the case in *Beler,* in which two sworn affidavits contradicted one another. *20 F.3d at 1433-36*; *see also Hankton, 432 F.3d at 790* (stating that the defendant did not show how agent's testimony about wiretapped conversations was unreliable, other than the fact that testimony was inadmissible hearsay).

The summaries of the wiretapped conversations supported Corral's testimony, which never wavered with respect to how much cocaine Corral estimated he sold to Clark. We agree with the district court that the complaint affidavit contained the requisite indicia of reliability for the district court to factor its contents into the drug-quantity determination. Between Corral's testimony and the corroborating summaries of the wiretapped conversation, the district court did not clearly err in finding by a preponderance of the evidence that Clark's *§ 841* offense involved more than 15 kilograms of cocaine.

III. CONCLUSION

The amended judgment of the district court correcting Clark's sentence is AFFIRMED.

Entered January 23, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff	)
	) Case No.
	) 02 CR 1129
v.	)
	) Judge Joan
	)B. Gottschall
RICKEY CLARK,	)
	)
Defendant.	)

ORDER

The defendant, Rickey Clark ("Clark") was charged with, *inter alia*, conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (2006) and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (2006). He entered a blind plea of guilty with respect to these counts but did not admit that the offenses involved any specific quantity of cocaine. At the government's request, the court held a hearing on December 7, 2006, to determine the drug quantity. At the hearing, co-defendant Juan Corral ("Corral") testified regarding the amount of cocaine he had supplied to Clark. Based on Corral's testimony, along with transcripts of telephone conversations between Corral and Clark submitted by the

government, the court concluded, by a preponderance of the evidence, that Clark had purchased between fifteen and fifty kilograms of cocaine. While the court was able to determine the drug quantity based on a preponderance of the evidence, it does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt. Corral's testimony was vague and uncertain, but it was the only testimony on the subject before the court; Clark declined to testify, according to counsel a decision made reluctantly based on a calculus of the risks of testifying when the standard of proof was so low.

On January 17, 2007, Clark appeared for sentencing. The Presentence Investigation Report ("PSR") submitted to the court indicated that Clark's sentencing range under the Federal Sentencing Guidelines ("Guidelines") was between 108 and 135 months. However, the PSR also noted that a mandatory minimum sentence of ten years or 120 months was required, and thus Clark's Guidelines range sentence was 120 to 135 months. Counsel for the government and Clark both mistakenly believed that there was no applicable mandatory minimum sentence, and represented this to the court. Based on the parties' representations, the court sentenced Clark to forty-eight months in prison.

The day after Clark's sentencing, the government submitted a motion to correct Clark's sentence pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure. The government now contends that the court was required to impose a mandatory minimum sentence of at least ten years

pursuant to 21 U.S.C. § 841(b)(1)(A)(ii) based on the amount of cocaine Clark was found to have possessed during the drug quantity hearing.

Rule 35 allows a court, within seven days from the date a sentence is imposed, to "correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim P. 35(a). The advisory committee notes to the rule provide that the clear error portion of the rule is to be narrowly construed and applied only when an obvious mistake has occurred that would almost certainly result in a remand. Thus, the question before the court is whether Clark's sentence would almost certainly result in a remand were it appealed.

Clark contends that, as both parties represented at the original sentencing, the mandatory minimum sentence cannot be applied in this case. If it does, Clark contends, the court will violate the rules announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), since the minimum sentence will be mandated based on facts found by the court applying a preponderance of the evidence standard. In *Apprendi*, the United States Supreme Court held that facts which increase the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt. 530 U.S. at 490. *Blakely* clarified this rule, holding that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303. In *Booker*, the

Court affirmed the rule it had announced in *Apprendi* and *Blakely*, but to avoid invalidating the Guidelines on analogous constitutional grounds, ruled that the Guidelines should be read as advisory rather than mandatory. 543 U.S. at 244-45. The question posed by the case at bar is whether a minimum sentence made mandatory by a statute rather than the Guidelines is subject to the constitutional rule of *Apprendi, Blakely* and *Booker*.[1]

The United States Court of Appeals for the Seventh Circuit has held that "judicially found facts used to set minimum sentences are not properly deemed 'elements' of the offense for Sixth Amendment purposes," *United States v. Jones*, 418 F.3d 726, 732 (2005), a rule which it says follows from the Supreme Court's decision in *Harris v. United States*, 536 U.S. 545 (2002). *Harris* held, in the words of the Seventh Circuit, that "minimum sentences based on judicial fact-finding could co-exist with the logical implications of the rule

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[1] It also warrants mention that, on the day of his resentencing, Clark submitted to the court additional authority in support of his position. Specifically, Clark refers the the court to *Cunningham v. California*, No. 05 -6551, 2007 WL 135687 (Jan. 22, 2007), decided by the United States Supreme Court yesterday. In that case, the Court considered the constitutionality of California's determinate sentencing law ("DSL"), which permitted trial judges to determine aggravating facts by a preponderance of the evidence; the judges' fact-finding had the effect of elevating defendants' sentences to a higher range. *Id.* at *4. The Court held that the DSL was unconstitutional under *Apprendi*, *Blakely*, and *Booker*. *Id.* at *14-15. *Cunningham* did not, however, discuss judicial fact-finding related to mandatory minimums or overrule *Harris v. United States*, 536 U.S. 545 (2002), discussed below.

announced in *Apprendi*." *United States v. Duncan*, 413 F.3d 680, 683 (7th Cir. 2005) (citing *Harris*, 536 U.S. at 550, 566-67). In *Duncan*, the Seventh Circuit further noted that nothing in *Booker* suggests the Court intended to overrule *Harris*, and therefore judges must continue to impose mandatory minimum sentences based on judicial fact-finding. *Id.* Moreover, the court said, if the *Harris* rule cannot coexist with *Apprendi* and its progeny, a ruling to that effect must come from the Supreme Court, not from the Seventh Circuit. *Id.* Therefore, the law in this circuit is clear: the judge may find facts which are essential for the imposition of a mandatory minimum sentence using a preponderance of the evidence standard, notwithstanding *Apprendi, Blakely* and *Booker*. *See United States v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006) (noting that *Booker* did not alter court's ability to find facts that have legal consequences except when those facts affect statutory maximum penalties); *United States v. Henry*, 408 F.3d 930, 934 (7th Cir. 2005) (drug quantity is not an element of the offense). *Accord United States v. Malouf*, 466 F.3d 21, 26 (1st Cir. 2006) (holding that drug quantity under section 841 is not an element of the offense, and facts that trigger application of mandatory minimums may thus be found by the judge based on a preponderance of the evidence standard).

The Seventh Circuit has noted the tension in this area of the law, but has declined to attempt to reconcile *Harris* with *Apprendi, Blakely*, and *Booker*, as long as *Harris* remains the Supreme Court's last word on the issue. *See Jones*, 418 F.3d at 732;

Duncan, 413 F.3d at 684-85. This court must follow the law of this circuit, which establishes clearly that drug quantity for purposes of applying the statutory mandatory minimum may constitutionally be found by a judge based on a preponderance standard. The court was obligated to impose the ten year statutory minimum required by 21 U.S.C. § 841(b)(1)(A)(ii) once it found, by a preponderance of the evidence, that Clark possessed between fifteen and fifty kilograms of cocaine. Because a remand for resentencing would almost certainly be the result were the court to leave Clark's current sentence in place, the court has jurisdiction pursuant to Rule 35(a) to resentence Clark to ten years, or 120 months, in prison.

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: January 23, 2007

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 21 United States Code (USC)
Controlled Substances Act

Part D -- Offenses and Penalties
Section 841. Prohibited Acts A
Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be

sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.

Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving --

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or

for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II , or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed

the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an

individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed --

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use --

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(7) Penalties for distribution.--

(A) In general.--Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition.--For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

Title 21 United States Code (USC)
Controlled Substances Act

Part D – Offenses and Penalties
Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.